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No. 90-1428

In The

Supreme Court of the United States

October Term, 1990

STANTON D. ERNEST,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

BRIEF IN OPPOSITION

ROLAND W. BURRIS
Attorney General
State of Illinois

ROSALYN B. KAPLAN
Solicitor General
State of Illinois

TERENCE M. MADSEN*

RICHARD S. LONDON
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5029

Counsel for Respondent

* Counsel Of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should deny the writ where the Illinois courts properly found that petitioner's actions disparaged the authority and dignity of the trial court?

2. Whether petitioner was afforded sufficient due process at his contempt hearing?

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BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondent respectfully suggests that this Court disregard petitioner's statement of the case. First of all, Petitioner does not cite to the record. Secondly, petitioner

refers to facts outside the record, specifically page 9, first full paragraph of the petition for writ of certiorari. And finally, petitioner's statement is argumentative.

This appeal of a finding of contempt arose out of proceedings to administer and settle an estate. On October 8, 1986, the Circuit Court of Wabash County, Illinois, Judge Robert M. Keenan, Jr. presiding, issued an order approving a final accounting and authorized distribution of the estate's assets. (R. C397-401). Subsequently, several named beneficiaries retained petitioner Stanton D. Ernest as their attorney. Ernest filed a petition to reopen the estate alleging, among other things, that final distribution had been wrongfully ordered without notice to all interested parties.

The petition requested that the October 8, 1986 Order Approving The Final Report and Inventory be vacated. (R. C422-25). Defendant filed a First Amended Petition to Reopen the Estate, which expanded the grounds for relief. (R. C427-441).

The October 8, 1986 Order stated that upon the filing of receipts of distribution by the Executor that the estate would be fully settled and closed. (R. C398). At the time of the contempt citation at issue on this appeal, receipts of distribution had not been filed (R. C88) and, therefore, the Estate had not legally closed. (R. C90).

On March 17, 1987, Ernest filed a Motion for Change of Venue ("the Motion") (R. C10). The grounds upon which petitioner asserted the Motion included that the testimony of the presiding judge, Robert M. Keenan, Jr., was "material and critical to [his client's] cause for impeachment purposes and furthermore, to determine

whether or not the Order of October 8, 1986, was obtained by fraud." (R. C12, C193). The Motion stated that petitioner wished to depose Judge Keenan and call him as a witness to testify as to what evidence was presented and what otherwise happened at the October 8, 1986 hearing. (R. C12, C197). There was no court reporter at the October 8, 1986 hearing, and, therefore, no transcript of the proceedings was available. (R. C197).

Judge Keenan denied the Motion on two grounds. First, petitioner's First Amended Petition had not alleged fraud in the October 8, 1986 Order, and, therefore, the judge's testimony as to what occurred at the October 8, 1986 hearing was not material to an issue in the case, as required by the venue statute. (R. C212.1). Thus, the only issue alleged as to the October 8, 1986 Order was one of proper notice to all parties. (R. C199, C212.1). Second, petitioner had presented no authority – and the judge personally knew of no authority – authorizing a party to call a judge to testify as to matters which were then being heard by him, and which he learned solely as a result of being the judge on the case. (R. C210). The judge stressed that permitting a litigant to call as a witness the judge who was presiding over a matter could lead to disqualification in almost every case, because a party might call a judge to testify whenever a dispute arose about events occurring in the courtroom. (R. C211).

The judge went on to explain, however, that, in any event, his testimony as to what occurred during the October 8, 1986 hearing would not be material to petitioner's clients' claim as to notice because, as the Court had previously stated, the docket entry from October 8, 1986 gave no indication that any evidence had been presented.

Rather, the judge indicated it stated that "executor and counsel appeared, no objections filed, no objectors present. Account examined and approved per written order signed and filed." (R. C198-99, 212.1). Thus, the judge was effectively ruling that he had no testimony to offer, in any event. In fact, Judge Keenan later explicitly stated exactly this in his Order of Recusal dated October 9, 1987: "I can provide no information about any events in court on October 8, 1986, except what I have read from the docket sheet, the Clerk's daily sheet and my own record book. I have no independent memory of the events of that day." (R. C180).

Judge Keenan concluded his denial of the motion, stating that he thought it would be improper for either of the parties in the case to issue a subpoena for the judge to testify unless they brought appellate authority to the judge in support of such a proposition. (R. C212.2).

On March 25, 1987, in blatant disregard of Judge Keenan's ruling of the previous day, petitioner had a deposition subpoena issued to him. (R. C29). Petitioner did not file a renewed motion for change of venue or memorandum of law citing authority which would authorize this action as the judge had demanded and which would have allowed the judge to reconsider his decision. (R. C133).

Judge Keenan ordered petitioner to appear before him at a hearing held later on March 25, 1987. (R. C187). At the hearing, Judge Keenan reiterated that his basis for denying the Motion had been that no authority had been provided authorizing a party to ask for testimony from a judge who was sitting in the case. In response to Judge

Keenan's questions, petitioner admitted he was aware of the basis for the court's ruling on the substitution motion. (R. C188). Petitioner stated that he understood this and that he had requested the subpoena anyway. (R. C189). The judge stressed that petitioner's action was "directly contrary to both the spirit and intent" of his ruling on the motion and offered petitioner the opportunity to withdraw the motion or be cited for contempt. (R. C189). Petitioner refused and the judge ordered a formal contempt citation to be issued. (R. 185). Petitioner did not request leave to cite authority or attempt to present authority at any time.

At this juncture, the judge emphasized that there were a number of alternatives to petitioner's actions which could have resolved this disputed issue. Specifically, the judge stressed that petitioner could have requested a Illinois Supreme Court Rule 308 finding authorizing an interlocutory appeal of the judge's denial of the Motion. (R. C189). The judge stressed that petitioner's failure to do so indicated that his purpose in subpoenaing the judge "was not to find out what the law is from a higher court, but merely to embarrass and hinder the court and that's the basis of the contempt citation." (R. C189-90). Judge Keenan quashed the subpoena and then referred the case for assignment to another judge to handle the matters arising from the contempt citation. (R. C190).

Judge Keenan issued Findings and an Order to Show Cause. (R. C35).

The order charged petitioner with committing a contumacious act in derogation of the court's authority. The

order recited the relevant events. (R. C37-38). Judge Robert S. Hill held a hearing on the Order to Show Cause why petitioner should not be held in contempt. (R. C214-287). At the hearing petitioner presented testimony explaining his actions in having the subpoena issued. (R. C245-273). There was no prosecutor to present a case against petitioner. (R. C218). Judge Hill stressed throughout petitioner's contempt proceeding that he was not acting as a prosecutor. (R. C218-19, C293). Judge Hill stated that the proceedings were in the nature of a response by petitioner to Judge Keenan's Order to Show Cause. (R. C218). Judge Hill did propound questions to petitioner, but stated that they were not for the purpose of cross-examination. (R. C259). Judge Hill asked petitioner questions concerning his understanding of Petitions to Reopen an Estate and his understanding of whether the *Estate of Merril H. Wright* was closed or had reopened. (R. C262-273). Judge Hill did not ask petitioner any questions concerning the Motion for Change of Venue, the subpoena issued to Judge Keenan, or the contempt citation hearing before Judge Keenan.

On May 26, 1987, Judge Hill issued an opinion finding that petitioner's conduct had been sufficiently embarrassing and disruptive as to constitute a contempt of court. (R. C88-95).

Although Judge Hill did not review Judge Keenan's denial of the motion, he supported Judge Keenan's decision, stating that Petitioner had brought forward no facts, beyond speculation, which indicated Judge Keenan would be a material witness in the case. (R. C92). Judge Hill stated that until Judge Keenan's testimony became required, a change of venue would not be appropriate. (R.

C92). Judge Hill concluded that he was unable to see how the suspicion of counsel, without more, that a judge had been improperly influenced, or otherwise misconducted himself, provided the basis for taking a discovery deposition of that judge "in order to see if, or how, he misconducted himself in arriving at a decision, the propriety of which is still in question before him." (R. C92, C94).

Judge Hill then stated that it would have been inappropriate for Judge Keenan to disregard the subpoena and simply to refuse to attend. Therefore, it was proper to quash the subpoena, "rather than to invite an action in contempt against himself." (R. C95).

Judge Hill held a sentencing hearing on June 15, 1987, to allow petitioner to present evidence mitigating the punishment (R. C292), after which the judge fined petitioner $50.00. (R. C332). The judge summarized the proceedings to that point and noted that petitioner, instead of serving the subpoena, could have attempted an appeal from Judge Keenan's ruling. (R. C325-331).

Petitioner filed a Motion for a New Trial which Judge Hill denied. (R. C127-134). In this motion, petitioner alleged that "substantial authority exists for the proposition that the judge in a case can be properly called as a witness in the same case in which he is presiding to testify as to matters he learned of while sitting as a judge in the case." (R. C101). Despite this claim, petitioner cited no such authorities in the motion. (R. C134). In a memorandum opinion, Judge Hill stressed, however, that the propriety of Judge Keenan's denial of petitioner's Motion for Change of Venue was never before him. (R. C129). Furthermore, he noted that the propriety of the denial of

the Motion had no bearing on the merits of the contempt proceeding. (R. C129).

Petitioner also raised a federal constitutional confrontation clause claim and fourteenth amendment due process clause claim alleging that no independent prosecutor prosecuted the contempt citation and that there was no witnesses against him. (R. C100-102). Rather, petitioner claimed that Judge Hill served as the prosecution of the contempt case. (R. C102).

The appellate court, with one justice dissenting, affirmed the circuit court's judgment. (*People v. Ernest*, 188 Ill. App. 3d 987) The court concluded that petitioner's conduct was contumacious. The court stated that a judge could not be a witness in a case in which he is presiding and that petitioner's actions in securing a subpoena tended to embarrass and obstruct the court in its administration of justice. The appellate court also rejected petitioner's contention that the contempt proceeding did not comport with due process, concluding the adequate procedures were employed at the hearing.

The Illinois Supreme Court granted Ernest's Petition for Leave to Appeal, and after briefing and argument affirmed the decisions of the lower court. The court held that

> We are aware that a defendant believed that issuance of the subpoena was required to preserve the issue for appeal and therefore was in the best interest of his clients.
>
> We do not believe that issuance of the subpoena was necessary, and we consider that defendant's actions overstepped the bounds of strenuous

> and persistent advocacy. In the motion for substitution of judge, defendant presented his clients' assertion that it was crucial that Judge Keenan testify concerning the October 8, 1986, hearing. Unlike the situation in *Holt*, therefore, the relevant issue had already been raised. Yet defendant did not request that Judge Keenan certify a question of law for an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill.2d R. 308). Nor did defendant seek leave to cause a discovery subpoena to be issued to Judge Keenan, citing authority in favor of his request. Defendant instead placed himself in a posture directly contrary to Judge Keenan's ruling, in an inappropriate attempt to trigger the procedural mechanism for its review.

People v. Ernest, No. 69318 (May 10, 1990). The court went on to hold that the contempt hearing satisfied the requirements of due process.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY FOUND THAT PETITIONER'S ACTIONS DISPARAGED THE AUTHORITY AND DIGNITY OF THE COURT

Petitioner claims that he subpoenaed the trial court judge in this case in a good faith effort to protect the interests of his clients and thus a finding of contempt conflicts with the decisional law of this court. Petitioner further alleges that his actions were not directly contrary to the court's order and that therefore his actions were not contumacious. Respondent answers that the Illinois courts properly found that petitioner disparaged the

authority and dignity of the court by disobeying a valid court order and that such finding was not in conflict with any decision of this Court. Respondent further maintains that petitioner's contention that the court's order was ambiguous is without merit where it is clear from the record that petitioner understood the implications of his actions and the intent of the judge.

Petitioner cites the cases of *Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553, 555 (1972) and *In re McConnel*, 370 U.S. 230 (1962) for the proposition that a lawyer's good faith efforts to advance the interests of a client are protected so long as they do not pose an obstruction or imminent threat to the administration of justice. Respondent agrees with petitioner that these cases stand for the proposition stated, but maintains that the facts in the case at bar are inapposite.

Petitioner argues that, "Ernest's only act alleged to be contumacious was to request issuance of a subpoena from a court clerk. He violated no direct court order; no order not to issue a subpoena appears in the transcript of the hearing on the motion to change venue and no such order can be fairly implied from the language used by the court." Pet. at 25. Petitioner has substantially misstated the primary issue on appeal.

The record and opinions below make clear that the reason petitioner was cited for contempt was not simply that he filed the subpoena but rather that in spite of the judge's reasons for denying the motion for substitution of judges, petitioner had a deposition subpoena served on the judge. The record reveals that the judge's comments at least implicitly ordered the parties not to subpoena

him. Further, when the judge extended an opportunity to withdraw the subpoena and told petitioner if he did not he would be cited for contempt, petitioner said, "I won't withdraw it, so you might as well do that." *People v. Ernest*, 188 Ill. App. 3d 987, 544 N.E.2d 1275 (5th Dist. 1989).

Petitioner's allegations to the contrary, the act of having the subpoena issued was merely the event which precipitated the citation. It was the fact that the judge had already stated that he could not be a witness, followed by the fact that petitioner refused to withdraw the subpoena when ordered to do so that perfected the contemptuous act. Petitioner's current position that it cannot be fairly implied from the record that the parties had been ordered not to subpoena the judge cannot be reconciled with petitioner's own understanding of the judge's intent, or with the higher court's reading of the record.

Petitioner admitted that he understood the judge's ruling, and further understood that the judge was ordering him to withdraw the subpoena, therefore his argument that no such order can be implied from the record is specious. (R. C189). As the Illinois Supreme Court stated, "to allow defendant the ability to escape a contempt citation, when it is clear from the record that defendant understood the implications of his actions, merely because the order at first may have been ambiguous would significantly disparage the authority of the court." No. 69318 at 26.

Petitioner never attempted to assuage the court's concern that it was not permissible to call as a witness the

judge who was presiding over a matter, by citing authority for that proposition. A number of methods existed for petitioner to properly cite such authority. As the Illinois Supreme Court held, " . . . the relevant issue had already been raised. Yet defendant did not request that Judge Keenan certify a question of law for an interlocutory appeal pursuant to Supreme Court Rule 308 (107 Ill.2d R. 308). Nor did defendant seek leave to cause a discovery subpoena to be issued to Judge Keenan, citing authority in favor of his request. Defendant instead placed himself in a posture directly contrary to Judge Keenan's ruling, in an inappropriate attempt to trigger the procedure for its review." No. 69318 at A-31-32. Petitioner also could have filed a motion to reconsider or moved to supplement the motion for change of venue. Petitioner's failure to do so is made even more egregious by the fact that he ignored specific suggestions by the trial court as to how he could have avoided the contempt charge. When viewed in this light, it is apparent that petitioner's actions were not conducted in good faith but rather could and did constitute contempt of court. Petitioner's claim that he acted in good faith in order to preserve the issue for appeal must also fail because he could have achieved his objective without filing the subpoena or later refusing to withdraw it.

Petitioner's claim that he caused the subpoena to issue in good faith because he believed the judge may have had necessary information must also fail. As the appellate court held, "a judge cannot and should not be a witness in a case in which he is presiding. If a subpoena were obeyed, the judge would be forced off the case, giving the litigant a powerful, but illicit tool." *People v.*

Ernest, at A-47. Judge Hill, ruling on the contempt citation noted that he was unable to see how the suspicion of counsel, without more, that a judge had been improperly influenced, or otherwise misconducted himself, provided the basis for taking a discovery deposition of that judge "in order to see if, or how, he misconducted himself in arriving at a decision, the propriety of which is still in question before him." (R. C92, 94).

The cases petitioner cites in support of his position that the Illinois courts' finding of contempt is in conflict with the law of this Court do not aid petitioner. In each of these cases, the court found that the contemnor had not committed a contumacious act based on the facts of that particular case. In *Holt*, for example, the findings of contempt were reversed after this Court explicitly noted that the petitioners were not charged with violating a valid court order. Such is not the case here.

While the judge did not directly "order" petitioner not to subpoena him, the court unequivocally stated that absent authority, it did not believe that it was appropriate for either party to cause a subpoena to issue. (R. C210). Further, prior to holding petitioner in contempt, the judge stressed that petitioner's action was contrary to both the spirit and the intent of his ruling. Petitioner clearly stated that he was aware of the basis of the court's order but had requested the subpoena anyway. (R. C189). Petitioner cannot now claim that he misunderstood the court's intent or argue that his actions were not contumacious because the judge did not specifically say that if one of the parties issued a subpoena he would be held in contempt.

Even assuming *arguendo,* that both the petitioner's and the court's clear statements can be interpreted another way, the act of causing the subpoena to issue was merely the event which precipitated the citation' as shown above. It was the fact that even after the judge had stated he could not be called as a witness, petitioner refused to withdraw the subpoena when *directed to do so* that perfected the contemptuous act.

Petitioner's contention that an attorney must be free to advocate the interests of his client is correct but is not relevant in this case. Petitioner's argument that he acted in the only manner possible in order to present the requested authority to the judge and/or perfect an appeal is ill-advised in light of the fact that other options were not only available, but were specifically delineated by the trial court.

II.

PETITIONER WAS AFFORDED SUFFICIENT DUE PROCESS AT HIS CONTEMPT HEARING

(Response to Petitioner's Issue Two & Three)

Petitioner complains that the contempt proceedings below failed to afford him due process of law. First, petitioner suggests that he was entitled to a formal criminal trial. Second, petitioner assails the lack of a prosecutor at his hearing and asserts that Judge Hill undertook a prosecutorial role. Third, petitioner argues that the failure of Judge Keenan to testify denied him his right of confrontation. Finally, petitioner implies, without argument,

that the State failed to meet its burden of proof. For the reasons below, these claims are wholly without merit.

The Illinois Supreme Court found that because Judge Keenan referred the contempt matter to another judge, the charge was in the nature of an indirect as opposed to a direct contempt. *People v. Ernest* at A-35. In an indirect criminal contempt prosecution, the appropriate standard is one of fundamental fairness, rather than the application of provisions of the Bill of Rights to contempt prosecutions as "crimes." *United States v. Bukowski*, 435 F.2d 1094 (7th Cir. 1970), *cert. denied*, 401 U.S. 911 (1970).

Fundamental fairness requires only that petitioner be given notice, opportunity to answer, and a hearing. *People v. L.A.S.*, 111 Ill.2d 539, 544, 490 N.E.2d 1271, 1273 (1986). Contempt of Court is a petty offense, and a contemnor is not generally entitled to a trial by jury, unless the contempt is statutorily punishable or actually punishable by a term of imprisonment greater than six months. *Taylor v. Hayes*, 418 U.S. 488, 495 (1974).

In this case, Judge Keenan issued an Order to Show Cause that specified that he based petitioner's contempt citation on petitioner's issuance of the deposition subpoena despite the court's denial of the Motion for Change of Venue and the specific "holding" that it would not be proper to call the sitting judge as a witness under the circumstances of the case. (R. C35-38). The Order to show Cause further specified that a hearing would be held to enable the petitioner to answer and respond to the charge. (R. C38). Thereafter, a hearing was held before Judge Robert S. Hill. (R. C214-287). Petitioner was represented by counsel at the hearing. (R. C216). Petitioner

called witnesses to testify in his behalf, and he testified himself. (R. C32, C61). Under such circumstances, there can be no question that petitioner received the notice and opportunity to be heard required by fundamental fairness.

As noted above, the applicable standard under the fourteenth amendment in contempt cases is fundamental fairness, rather than the specific due process requirements of the fifth and sixth amendments. *Bukowski* at 1094. Thus petitioner has no specific right to confront the witnesses against him.

Under Illinois law, which consistently follows the law as established by this Court, petitioner's due process rights were sufficiently protected. In *People v. Winchell*, 45 Ill. App. 3d 752, 359 N.E.2d 487 (3rd Dist. 1977), the hearing was fundamentally fair although the contemnor was uncounseled, did not present evidence on his own behalf, did not cross-examine any witnesses, and did not ask for a continuance to prepare a defense. Likewise, in *Armentrout v. Dondanville*, 67 Ill. App. 3d 1021, 385 N.E.2d 829 (2d Dist. 1979), the hearing was fundamentally fair although *both* the contemnor and the State declined the judge's offer to present evidence and call witnesses, and the finding of contempt rested on the pleadings and memoranda submitted by the parties. In both cases, as here, the contemnor was familiar with the facts and was given the opportunity to explain himself and to challenge the procedure employed.

Petitioner urges that Judge Hill undertook a prosecutorial role at the hearing. This is simply not true. Judge Hill stressed throughout the proceedings that he

was not acting as the prosecutor. (R. C5-6, C293). He did, however, ask petitioner questions in order to clarify petitioner's, as well as his own, understanding of the circumstances of this case. Under Illinois law, the court may properly question to elicit truth or clarify an issue. *People v. Ernest* at A-38 citing *People v. Wesley*, 18 Ill.2d 138, 155 (1959). Petitioner has cited no case law which would indicate that the role the judge took in these proceedings was prosecutorial. In any event, he could not because Judge Hill did not do so.

Petitioner's claim that he was denied the right to confront the witnesses against him must also be rejected. The Illinois Supreme Court held that petitioner's conduct was a matter of record which petitioner did not deny. Therefore, no witnesses were necessary to establish the contempt. *Ernest* at A-39.

Finally, petitioner argues that the State failed to meet its burden of proof. The fact of the matter is, however, that the record and transcripts of all the proceedings, of which the court was authorized to take judicial notice, were before Judge Hill. *Ernest* at A-37. It is apparent from the nature of petitioner's act that Judge Keenan was hindered in performing his judicial duties. This hindrance and derogation of Judge Keenan's authority is plain from the record and eventually forced Judge Keenan to withdraw from the case due to petitioner's contumacious acts. Under the facts and circumstances of this case, the Illinois Supreme Court found that petitioner was found guilty beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General
State of Illinois

ROSALYN B. KAPLAN
Solicitor General
State of Illinois

TERENCE M. MADSEN*

RICHARD S. LONDON
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5029

Counsel for Respondent.

* Counsel of Record